

Board of Alien Labor Certification Appeals
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

DATE: June 11, 1997

CASE NO: 95-INA-519

In the Matter of:

GEORGE AND KATHERINE LEONARD,
Employer,

On Behalf of:

ALTHEA K. COUSINS,
Alien

Appearance: Michael Shane, Esq. Miami, Florida

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Althea K. Cousins by George and Katherine Leonard under § 212(a)(5) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at Atlanta, Georgia, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.¹

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

Statement of the Case

On January 3, 1994, the Employer applied for labor certification to permit it to employ the Alien on a permanent basis as a "Domestic Cook" to perform the following duties in their private home:

Plan, prepare, cook and serve 3 meals a day to employer; follow recipes for low salt, low cholesterol diet. Shop for food, cleanup kitchen and dining area after meals. No housekeeping required.

The position was classified as "Cook, Domestic" under DOT Code No. 305.281-010.² The application (ETA 750A) indicated no minimum education requirement, but required that applicants must have two years of experience in the Job Offered or in the Related Occupation that the Employer described as "Any occupation(s) showing attachment to domestic work. (The 'job offered' & 'related occupation' are alternative requirements."³

Notice of Findings. After receiving the results of the Employer's recruitment effort, the CO issued a Notice of Findings (NOF) on March 24, 1995. AF 24-28.

(1) The CO directed the Employer to establish business necessity on grounds that the Alien's address and the Employer's address are the same. 20 CFR § 656.21(b)(2)(iii). AF 27.

(2) The CO directed the Employer to document that any U. S. workers who applied for the job and were not hired, were rejected solely for lawful job-related reasons. 20 CFR §§ 656.21 (b)(6) and 656.24(2)(ii). The CO's grounds were that at least one U. S. worker applied for the job and reported contact in which he was

²Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

³The application also specified that this was a 40 hour a week job from 7:00 a.m. to 7:00 p.m., at \$5.87 per hour, and that references were required.

advised that the Employer "had someone else in mind for the job."
AF 28.

(3) The CO directed the Employer to document that a bona fide job exists that is truly open to U. S. workers. The CO's grounds were that the U. S. worker was qualified and available for the job, but was rejected by the Employer. Taking note that the Alien had worked for the Employer since 1993, the CO proposed to deny certification on the grounds that the record failed to demonstrate that this position was bona fide and was clearly open to qualified U.S. workers, citing 20 CFR § 656.20 (c)(8). AF 28.

Rebuttal. Thereafter, on April 14, 1995, the Employer filed a rebuttal in which Mrs. Leonard asserted that, notwithstanding the circumstance that the Alien and the Employer lived at the same address, this was not a "live-in" job, repeating that, "The employee is not required to live-in." She acknowledged that the Alien was living in her home for five days a week for the Alien's convenience, but that this was not a requirement of the position offered. Employer further stated that a job interview was duly scheduled for the U. S. worker who applied, but never appeared on the appointed day or thereafter. Employer explicitly denied that she had told the U S. worker that she had someone else for the job.

Final Determination. On April 27, 1995, the CO denied certification on the grounds that U. S. workers were available who were able, willing and qualified for the job. The CO concluded in the Final Determination (FD) that a U.S. worker was rejected for other than a lawful, job-related reason, explaining that the Employer rejected the applicant for not coming to an interview. The CO then stated that, "[D]ocumentary evidence included with the application provides significant basis for the CO to question the employer's good faith efforts to hire qualified, available, and willing U.S. workers." This was then clarified by the CO as follows:

As indicated in the NOF, the employer had not advertised the position as a live-in; however, the alien has been employed, with live-in privileges, since 1993. The CO considered the fact that the alien was living with the employer relevant and important in regards (sic) to the application. Employer was instructed in the corrective action to readvertise with the live-in requirement and to prove business necessity for the live-in. CO notes that without the live-in privilege being offered to U. S. workers, the employer is not offering the same wages, working conditions, etc., to U. S. workers as were provided to the alien. Therefore, the employer has treated the alien more favorably than U. S. workers.

DISCUSSION

The facts of record support rejection of this application under 20 CFR § 656.21(g)(8) on grounds of the inequality of wages and working conditions in addition to the violation of 20 CFR § 656.21(b)(2)(iii) cited by the CO. The CO's Final Determination concluded that the Alien was treated more favorably than U. S. workers by being allowed to live in the Employer's premises at her option. This was properly weighed in the NOF and Final Determination, since (1) Employer's newspaper advertisement omitted any mention of these disparate working conditions in that the benefits that were impermissibly more favorable to the Alien, and (2) in the NOF the CO placed Employer on notice that the application violated 20 CFR §§ 656.20(c)(8), 656.21(b)(6), and 656.24(b)(2)(ii). AF 27-28. As the Employer admitted that the Alien was given the option to live-in as a perquisite incidental to the salary or wages offered in the application, the Employer was required to show that the job has been and is clearly open to any qualified U. S. worker under the same working conditions as the Alien enjoyed. As indicated above, the Employer did not sustain this burden of proof.

Accordingly, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed for the reasons hereinabove set forth.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

George and Katherine Leonard, Employer,
Althea K. Cousins, Alien

CASE NO : 95-INA-519

PLEASE INITIAL THE APPROPRIATE BOX.

	:	:	:	:
	:	CONCUR	:	DISSENT
	:	:	:	COMMENT
	:	:	:	:
Holmes	:	:	:	:
	:	:	:	:
	:	:	:	:
Huddleston	:	:	:	:
	:	:	:	:
	:	:	:	:

Thank you,

Judge Neusner

Date: May 30, 1997